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No. 02-1221

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

UNITED STATES SHOE CORP., PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICUS CURIAE THE CUSTOMS AND INTERNATIONAL TRADE BAR ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37(a)(3), upon written consent of all parties, *amicus curiae* the Customs and International Trade Bar Association ("CITBA") respectfully submits this brief *amicus curiae* in support of Petitioner United States Shoe Corp., and urges that the petition for a writ of *certiorari* be granted.

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, CITBA, founded in 1926, is a voluntary association of attorneys who maintain an interest in the field of customs law, international trade law and related matters. CITBA members represent United States importers, exporters and others concerned with matters that involve the United States customs and international trade laws. CITBA's members regularly represent clients before the United States Court of International Trade ("CIT") and the United States Court of Appeals for the Federal Circuit ("CAFC") in Customs and trade matters, and the Association's members act as counsel for thousands of exporters who have brought suit challenging the Harbor Maintenance Tax ("HMT") on exports, which this Court held unconstitutional in *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998).

CITBA regularly submits briefs *amicus curiae* in this

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1. Counsel for the parties have consented to the filing of this *amicus brief*, and the letters of consent are being filed with the Court under separate cover. Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part. Further, no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Court[2] and others in cases involving significant issues arising under the international trade and Customs laws of the United States. This case is particularly significant, since it presents the important question of whether exporters who were compelled to pay hundreds of millions of dollars in unconstitutionally-exacted HMTs are entitled to receive interest on refunds of those taxes.

Because Congress expressly provided in the *Water Resources Development Act*, 26 U.S.C. § 4462(f)(1)("WRDA"), that the HMT is to be treated, for administration and enforcement purposes, "as if such tax were a customs duty," and because Section 505 of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1505), requires the payment of interest on refunds of all excess customs duties collected, it is clear that Congress has waived the government's sovereign immunity and directed that interest be paid on all HMT refunds. Because the Federal Circuit failed to read these two governing statutes *in pari materia*, its decision below denying interest on refunds of the export HMT is erroneous. The court of appeals' decision frustrates not only specific Congressional intent, but also the explicit command of the Framers of the U.S. Constitution that no burden of any kind be placed on exports. *See Fairbank v. United States*, 181 U.S. 283 (1901); *United States v. Hvoslef*, 237 U.S. 1 (1915).

Because the petition for *certiorari* in this case raises significant legal and Constitutional issues for review by this Court, the writ should be granted.

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2. *See*, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 224 n.4 and 233 (2001).

SUMMARY OF ARGUMENT

The Federal Circuit's ruling that interest need not be paid on refunds of the unconstitutionally-exacted Harbor Maintenance Tax on exports ignores Congress' explicit waiver of statutory immunity with respect to such refunds. Section 505(b) of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1505(b)) expressly waives sovereign immunity by providing that interest shall accrue on all customs duties collected by the U.S. Customs Service. The WRDA, 26 U.S.C. § 4462(f)(1), requires that "all administrative and enforcement provisions of [the] customs laws and regulations shall apply in respect of the [HMT] *as if such tax were a customs duty*" (emphasis added). Because provisions of law governing the payment of tax refunds and interest thereon unquestionably relate to the "administration and enforcement" of such taxes,[3] it follows that Congress directed that refunds of the HMT – like refunds of customs duties – be paid with interest.

The circuit court erred by failing to read the provisions of the Tariff Act and the WRDA *in pari materia*. By failing to apply this essential canon of statutory construction, the circuit court concluded erroneously that 19 U.S.C. § 1505, while unquestionably a law governing "administration and enforcement" of the Customs laws, did not apply to the export

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3. *See*, e.g., *Int'l Business Machines Corp. v. United States*, 201 F.3d 1367 (Fed Cir. 2000), *cert. den.*, 531 U.S. 1183 (2002)(28 U.S.C. § 2411, providing for the payment of interest on judgments awarding refunds of excess taxes, held inapplicable to the export HMT based on a provision in the *Water Resources Development Act*, 26 U.S.C. § 4462(f)(3) directing that the HMT "shall not be treated as a tax" for purposes of laws "relating to the *administration and enforcement* of internal revenue taxes")(emphasis added).

HMT. This interpretation fails to give effect to the Congressional intent manifested in the WRDA.

Significantly, in 1993 Congress expanded the waiver of sovereign immunity contained in 19 U.S.C. § 1505, to make explicit that interest must be paid on *all* refunds of customs duties. Congress must be presumed to have made this amendment with full knowledge that, seven years earlier, in the WRDA, it had directed that the HMT be treated as a customs duty.

Finally, the Federal Circuit erred in holding that 19 U.S.C. § 1505 did not authorize an award of interest to petitioners because that statute speaks of the "liquidation or reliquidation of the applicable entry or reconciliation" – acts which the Customs Service has elected not to perform with respect to the export HMT. *All* "customs duties" are deposited with entries or reconciliations, which then undergo "liquidation or reliquidation." Section 1505(b), therefore, compels the payment of interest on *all* refunds of excess customs duties, not merely on a class or subset of excess duties. By refusing to award interest to petitioners, the circuit court ignored the Congressional command in the WRDA that the HMT be treated "as if such tax were a customs duty." The WRDA's use of the phrase "as if" creates the legal fiction that the HMT is a customs duty. It is therefore irrelevant that Customs has elected not to use the terms "entry," "reconciliation," "liquidation" or "reliquidation" in providing for the collection, determination and refund of the export HMT.

STATEMENT

Amicus curiae the Customs and International Trade Bar Association ("CITBA") respectfully files this brief on

consent of all parties in support of petitioner United States Shoe Corp., urging that this Court grant the request for issuance of a writ of *certiorari* to the Court of Appeals for the Federal Circuit.

Amicus curiae concurs with the Statement of the Case set forth in petition for *certiorari*.

REASONS FOR GRANTING THE WRIT

A. The Water Resources Development Act, 26 U.S.C. § 4462(f)(1), Expressly Waives the Government's Sovereign Immunity from an Award of Interest By Making the Customs Interest Statute, 19 U.S.C. § 1505, Applicable to the HMT

While interest may be recovered in a suit against the government only if there has been a clear and express waiver of sovereign immunity, *Library of Congress v. Shaw*, 478 U.S. 310, 311 (1986), the Federal Circuit erred in holding that 19 U.S.C. § 1505, which authorizes an award of interest, "does not apply to exports because it speaks only to imports." Pet. App. at 6a. While Section 1505 uses nomenclature which describes the collection and determination of customs duties on imports, the WRDA clearly commands that for purposes of the HMT, "**all administrative and enforcement provisions of [the] Customs laws and regulations shall apply in respect of the tax** . . . (and in respect of persons liable therefor) **as if such tax were a customs duty**." 26 U.S.C. § 4462(f)(1). (emphasis added).

Because the customs laws, specifically 19 U.S.C.

§1505 (b)[4] and (c),[5] provide for the payment of interest on *all* refunds of excess duties, it is clear that the WRDA and the Tariff Act, when read *in pari materia*, constitute an express waiver of sovereign immunity with respect to the payment of interest on refunds of the HMT. The circuit court erred in holding otherwise.

In holding that Section 1505 did not apply to the HMT on exports, the Federal Circuit, relying on its decision in *International Business Machines Corp. v. United States*, 201 F.3d 1367, 1371 (Fed. Cir. 2000)("*IBM*"), determined that,

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4. Section 505(b) of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1505(b)) provides that:

> The Customs Service shall collect any increased or additional fees due, together with interest thereon, or **refund any excess monies deposited, together with interest thereon**, as determined on a liquidation or reliquidation. Duties, fees and interest determined to be due on liquidation or reliquidation are due 30 days after the issuance of the bill for such payment. Refunds of excess moneys deposited, **together with interest thereon**, shall be paid within 30 days of liquidation or reliquidation. (Emphasis added).

5. Section 505(c) of the Tariff Act of 1930, *as amended* (19 U.S.C. § 1505(c)), provides that:

> Interest assessed due to an underpayment of duties, fees or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits such estimated duties, fees and interest . . . . to the date of liquidation or reliquidation of the applicable entry or reconciliation.

because Section 1505 contains references to terms such as "entry," "liquidation" and "reliquidation," it "does not apply to exports because it speaks only of imports" Pet. App. 6a. As in *IBM,* the court of appeals "declined to rewrite" the statute to make it applicable to the export HMT.[6] No rewriting of Section 1505 is necessary, however, for Congress, in 26 U.S.C. § 4462(f)(1), adopted the administrative and enforcement provisions of customs laws, including Section 1505, and directed that they be applied to the HMT "as if" the HMT were a Customs duty. Congress' extension of the customs laws was not limited to the HMT on imports alone, but encompassed the HMT as a whole.

By failing to construe the Tariff Act and 26 U.S.C. § 4462(f)(1) *in pari materia,* the circuit court disregarded the statutory commands and failed to effectuate Congressional intent[7]. Clearly, 26 U.S.C. § 4462(f)(1) adopts all of the

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6. In *IBM,* the Federal Circuit did concede that "the interest provisions of the customs laws [viz. § 1505] * * * apply to the HMT." 201 F.3d 1367, 1374 (Fed. Cir. 2000).

7. Congress' intent is manifest from the legislative history to the WRDA. The Senate Report accompanying the Act noted that:

> There are currently no Federal fees or charges assessed on port use in the United States. There is, however, a substantial body of law relating to the importation of merchandise and the collection of Customs duties. The Tariff Act of 1930, as amended (codified in volume 19 of the U.S. Code) and the Customs Regulations (volume 19 of the Code of Federal Regulations) set out detailed rules and procedures for the classification and appraisal of imported merchandise and for the administration and enforcement of the customs laws.
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> * * *

provisions of 19 U.S.C. Title 19, without restating them, for use in the administration and enforcement of the HMT. Where two statutes are thus related, they must be construed *in pari materia*. *See* 2B SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, §51.07 at p. 267 (6th ed. 2000)(A special class of related statutes is created where one statute adopts the terms of the other statute without restating them. Thus, a statute may refer to another and incorporate part or all by reference). *See also Beals v. Hale*, 45 U.S. 37 (1946)(It is an established rule of law that all acts *in pari materia* are to be taken together, as if they were one law.).

This Court has recognized that, where Congress intends to incorporate an enforcement scheme set out in an existing statute, it can do so through adoption by reference. *See Lorillard v. Pons*, 434 U.S. 575, 578 (1978). A statute which refers to a subject generally adopts the law on the subject, including all amendments and modifications of the law subsequent to the enactment of the reference statute. 2B SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, §51.08, at p. 275 (6th ed. 2000).

By declining to apply 19 U.S.C. § 1505 to the export HMT, the court of appeals frustrated Congress' clear intent that the HMT be treated "as if it were a Customs duty."

> In order to facilitate the administration and enforcement of the port user charges by the U.S. Customs Service, the committee amendment provides that all administrative and enforcement provisions of U.S. customs statutes and treasury regulations thereunder are to apply with respect to the port user charges imposed by the committee amendment *as if such charges were customs duties*. [Emphasis added].

Rep. 99-228, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 6639, at 6714-6715.

Refunds of excess Customs duties are paid with interest pursuant to Section 1505; refunds of excess HMTs assessed on exports are not.

It is also important to note that 19 U.S.C. § 1505 does not provide for payment of interest on refunds of *some* customs duties, but on refunds of *all* customs duties. As this court has noted, the Constitution limits the imposition of customs duties to imports. *United States Shoe Corp. v. United States*, 523 U.S. 360, 366 (1998). Customs duties are deposited on imported merchandise at the time the importer of record files an "entry." 19 U.S.C. § 1484. By law, Customs is required to "liquidate" the entry, determining the rate and amount of duty chargeable on goods covered by the entry, and also determining "any increased or additional duties, taxes and fees due or any excess of duties, taxes and fees deposited." 19 U.S.C. § 1500(d). Customs may also "reliquidate" the entry, either voluntarily, or following the allowance of a protest or the issuance of a judgment by the United States Court of International Trade. *See* 19 U.S.C. §§ 1501, 1503.

Section 505(b) of the Tariff Act, 19 U.S.C. § 1505(b), requires the Customs Service to, *inter alia*, "refund any excess moneys deposited, *together with interest thereon*, as determined on a liquidation or reliquidation" (emphasis added). Customs' regulation providing for refunds of excess HMTs, 19 C.F.R. § 24.24(e)(4)(2000 and 2001), was adopted under authority of 19 U.S.C. § 1505,[8] and, indeed, the repayment of HMT principal to exporters was and is made under authority of Section 1505.

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8. *See* 67 Fed. Reg. 31,948 (May 13, 2002); 66 Fed. Reg. 16,854 (March 28, 2001); 66 Fed. Reg. 21,086 (April 27, 2001); 66 Fed. Reg. 34,813 (July 2, 2001).

Since 19 U.S.C. § 1505 is unquestionably an "administrative and enforcement" provision of the customs law – it is codified in Chapter 4 of Title 19, which sets out the "administrative provisions" of the customs laws – the court of appeals' failure to apply the interest provisions of that law to refunds of the HMT is inexplicable.

In *IBM*, the Federal Circuit suggested that Section 1505(c) did not apply to export HMT refunds, since it "contemplates an entirely different factual scenario from the one before us," a scenario in which the terms "importer of record," "liquidation" and "entry" are used. Pet. App. 128a. The court below adopted this view. Pet. App. 6a. As the foregoing analysis shows, however, these terms of statutory art do not describe some alien landscape, but rather the procedures for the collection and administration of customs duties – *the very procedures which Congress, in 26 U.S.C. § 4462(f), extended and made applicable to the HMT.*

Thus, in directing that interest on refunds of Customs duties be paid from the date the importer or taxpayer "deposits estimated duties fees or interest . . . to the date of liquidation or reliquidation of the applicable entry or reconciliation," 19 U.S.C. § 1505(c) merely defines the time period for which interest is payable – from the date the excess duties or taxes are deposited until the date the duties or taxes are refunded (through liquidation or reliquidation of the entry).

That Customs may have elected not to use the term "entry" to describe the process for depositing the export HMT, nor the term "liquidation" to describe its final determination of the amount of HMT owed, does not preclude the application of 19 U.S.C. § 1505 to the tax. The legislative history of 26 U.S.C. § 4462(f), the explicit requirement that the HMT be treated "as if it were a customs duty" and

Congress' extension to the HMT of customs laws which do not mention the tax by name, all support the overriding principle that the customs laws must be interpreted to include the HMT within their administrative and procedural coverage.[9] Cf. *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1983)("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear Congressional intent").

In this case, the Federal Circuit acknowledged the Congressional direction that the HMT be treated, for administration and enforcement purposes, "as if such tax were a customs duty," and then shrank from its duty to apply 19 U.S.C. § 1505 to HMT refunds precisely because that statute employed the nomenclature used in the administration of customs duties. This yields a self-contradictory determination which not only ignores Congress' express waiver of sovereign immunity, but also frustrates clear Congressional intent that such waiver extend to the HMT.

Canons of statutory construction require that 26 U.S.C. § 4462(f) be interpreted properly to extend the

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9. That Congress in 26 U.S.C. § 4462(f)(1) directed Customs to treat the HMT "as if" it were a Customs duty indicates that Congress was quite aware that the HMT was not, in fact, a duty. The use of the phrase "as if" was intended to create the legal fiction that the HMT was to be treated as though it underwent all procedures attendant to the administration and enforcement of Customs duties – collection, determination and refund, to name a few. Accordingly, it is irrelevant whether the HMT in a particular case is the subject of an "entry" or "liquidation," or is paid by an "importer of record." Congress clearly intended that the HMT be treated *as if* these procedures had been applied. "As if" means "in the same manner and to the same extent." *New England Commercial Bank v. Stockholders of Newport Steam Factory*, 6 R.I. 154, 187 (1859).

administrative provisions of the Customs law to the HMT in all its iterations (imports, exports, inland waterway movements, foreign trade zone admissions, passenger fees). To hold otherwise, as the court of appeals did, in this case and *IBM* as well, "would contravene the 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Dep't of Revenue of Oregon v. AFC Industries, Inc. et al.*, 510 U.S. 332 at 340 (1994), citing *Mountain States Telephone and Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985). The Federal Circuit's interpretation applies 19 U.S.C. § 1505(c)'s interest provisions to HMTs assessed on import vessel movements[10] – which Customs has by regulation (19 C.F.R. § 24.24(e)(2) (2001)) chosen to collect by requiring the filing of import entries and to refund pursuant to "liquidations" or "reliquidations" – but denies application of the interest provisions to HMTs which Customs has chosen to collect through other procedures. Nothing in 26 U.S.C. § 4462(f) suggests that Congress intended that the customs laws be

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10. It should be noted that not every HMT assessed with respect to "import vessel movements" is assessed on "imported" merchandise which is otherwise subject to the assessment of Customs duties. Indeed, 26 U.S.C. § 4462(a)(1)(B) defines taxable "port use" to include "the unloading of commercial cargo from, a commercial vessel at a port." The tax falls not only on "imports," but also on goods shipped from one United States port to another. This might occur if, for example, a United States-flag vessel discharged at a port both imported merchandise and goods carried in coastwise trade. The courts have held that the HMT is not eligible for duty drawback under 19 U.S.C. § 1313(j), because it is not a tax assessed upon merchandise "because of . . . its importation." *See*, e.g., *George E. Warren Corp. v. United States*, 201 F. Supp. 2d 1366, 1371 (Ct. Int'l Trade 2002), *appeal docketed*, No. 02-1467 (the HMT "is intended to be assessed independently of whether the 'port use" is for imports, exports or other shipments; a shipment unloaded in Savannah is charged the same HMT regardless of whether its origin is San Francisco or Singapore"); *see also Texport Oil Co. v. United States*, 185 F.3d 1291 (Fed. Cir. 1999).

extended to certain HMTs, but not to others. Moreover, it would be entirely implausible to suggest that Customs could frustrate Congress' intent to treat the HMT "as if" it were a Customs duty by simply electing an unusual method of collecting the tax.[11]

The terms of a statute cannot be read in a vacuum. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)("[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme", citing *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 at 809 (1989). "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" *Id.*, citing *Gustafson v. Alloyd Co.*, 513 U.S. 561 at 569 (1995) and *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385 at 389 (1959).

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11. If, as the court of appeals ruled, the government's duty to pay (or not pay) interest on refunds of excess HMT turns solely on the method which Customs chooses for collecting the tax, then it follows that Customs might electively stop collecting the HMT on imported merchandise by means of the "entry" and "liquidation" procedures, and collect the tax using the same quarterly return procedure employed for the export HMT. This would eliminate the government's existing obligation to pay interest on refunds of import HMT. However, there is nothing in either the WRDA or the Tariff Act to suggest that Congress delegated to Customs the power to define the scope of the waiver of sovereign immunity. Indeed, since 26 U.S.C. § 4462(f)(1) directs Customs to treat the HMT "as if it were a Customs duty," and since all Customs duties are collected through the "entry" and "liquidation" procedures of 19 U.S.C. §§ 1484 and 1500, the better view is that Congress intended that all HMTs be collected using these procedures, or administered as though they were.

B. Following Enactment of the WRDA, Congress Expanded the Waiver of Sovereign Immunity Requiring Payment of Interest on Refunds of Customs Duties

It is also noteworthy that, several years after enacting 26 U.S.C. § 4462, and extending the administration and enforcement provisions of the Customs laws to the HMT, Congress expanded the waiver of sovereign immunity contained in 19 U.S.C. § 1505. In taking this action, Congress must be presumed to have been aware of its earlier legislation extending provisions of the Customs law to the HMT.

Prior to 1993, the availability of interest on refunds of excess customs duties was limited. Former section 520(d) of the Tariff Act of 1930, *as amended,* (19 U.S.C. § 1520(d)) provided that where duties were refunded as the result of a protest or petition for reliquidation, interest was to be allowed "on any amount paid as increased or additional duties under section 1505(c) of this title . . . ." This resulted in an anomalous situation. If an importer deposited excess duties at the time of entry, and subsequently received a refund, no interest was payable. However, if another importer, facing the same legal issue, tendered the excess duties as "additional duties" at the time an entry liquidated, it received interest on those sums when the excess duty was refunded. Ironically, the party whose excess duties had been on deposit with Customs for the longer period received no interest. Absent a waiver of sovereign immunity, however, the courts ruled that there was no basis for awarding interest on duty refunds other than as expressly provided in the statute. *Kalan, Inc. v. United States*, 944 F.2d 847, 850-52 (Fed. Cir. 1991), *cert. denied*, 503 U.S. 906 (1992).

Congress addressed the anomaly in Section 642 of the

North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103-182, 107 Stat. 2057, which amended 19 U.S.C. § 1505(c) to require the payment of interest on *all* refunds of excess customs duties. Section 642 also amended the statute to require importers to pay interest to the government on all underpayments of Customs duties. The Congressional purpose, as set out in the legislative history, was to "provide equity in the collection and refund of duties and taxes, together with interest, by treating collections and refunds equally." *See* H. Rep. 103-361(I), 103rd Cong., 1st Sess., *reprinted at* 19 U.S.C.C.A.N 2552, 2690.

In amending 19 U.S.C. § 1505(c) to expand the waiver of sovereign immunity with respect to the payment of interest on duty refunds, Congress is presumed to have been aware of its earlier enactment of the WRDA, and its extension of the administrative and enforcement provisions of the Customs laws to the HMT. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)(Congress presumed to have been aware of prior legislation addressing same or related subject matter). Moreover, as noted above, where Congress adopts a statute by reference, it is it is presumed to adopt all subsequent amendments and modifications of the referenced statute. 2B SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 51.08 (6th ed. 2000). It must also be assumed that Congress intended both statutes to remain fully effective. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).[12]

Thus, when Congress amended 19 U.S.C. § 1505 to expand the waiver of sovereign immunity relative to Customs duties, it must be presumed that Congress was fully aware

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12. The Customs Service has certainly applied the expanded "interest" provisions of 19 U.S.C. § 1505 to HMTs which are paid in connection with import entries. *See*, e.g., *Customs Headquarters Ruling 227649 of October 3, 1997.*

that it was also expanding the waiver of immunity with respect to refunds of HMTs, and intended that result. By the same measure, the amendment of 19 U.S.C. § 1505 must also be assumed to require taxpayers to pay interest to Customs where HMTs are underpaid.

Congress, in expanding the waiver of sovereign immunity for payment of interest on refunds of excess customs duties, must be presumed to have been aware of its earlier enactment of 26 U.S.C. § 4462(f)(1), and to have intended that the waiver of sovereign immunity apply with equal force to the HMT, "as if such tax were a customs duty." The court of appeals erred in holding otherwise.

C. Certiorari Should Be Granted in Light of the Commercial Importance of the Issue Presented

CITBA's members collectively represent thousands of exporters who were unlawfully taxed with hundreds of millions of dollars in unconstitutional export HMTs. The importance of the legal and constitutional issues presented in this case is matched by the case's commercial and fiscal importance.

From the time the export HMT entered into force on April 1, 1987 until the time this Court held it unconstitutional in *United States Shoe*, the Customs Service collected about $1.435 billion in unconstitutional taxes from exporters. These monies were deposited into a Harbor Maintenance Trust Fund, and invested in securities for the benefit of the government. *See* 26 U.S.C. § 9505, 9602(b).

The lost time-value of exporters' money exceeds $700 million. This Court's decision concerning whether interest is payable on refunds of the export HMT will affect the

disposition of more than 4,000 lawsuits pending in the United States Court of International Trade. An additional 7,500 administrative claims pending with Customs, seeking refunds of the export HMT will also be affected by this Court's decision on the interest issue. The fiscal importance of the issue presented by the petition warrants the issuance of the writ of *certiorari*. *See United States v. Hill*, 506 U.S. 546 (1993).

Certiorari is also warranted by the unique nature of this case, and the constitutional context in which it arises. While Congress has provided for payment of interest on judgments awarding refunds of excess internal revenue taxes (28 U.S.C. § 2411), and on refunds of excess duties, taxes and fees collected under the customs laws (19 U.S.C. § 1505), the court of appeals' decision denies interest to taxpayers who were unconstitutionally assessed with the export HMT. The notion that Congress has waived sovereign immunity to permit the award of interest on virtually all tax refunds, yet retains such immunity when the tax is unconstitutional, is fundamentally flawed. The better view, as explained above, is that Congress has indeed waived sovereign immunity to not merely permit, but to *require* the payment of interest on refunds of unconstitutionally-collected export HMTs.

CONCLUSION

The petition for a writ of *certiorari* presents significant statutory and Constitutional issues. Given the legal and commercial significance of the issues presented, the writ of *certiorari* should issue.

Respectfully submitted,

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